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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

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I. INTRODUCTION

1. On 9 December 1991, the General Assembly adopted resolution 46/55 entitled "Consideration of the draft articles on jurisdictional immunities of States and their property", paragraphs 2, 3 and 4 of which read as follows:

> "The General Assembly,
>
> "...
>
> "2. Invites States to submit, not later than 1 July 1992, their written comments and observations on the draft articles adopted by the International Law Commission;
>
> "3. Requests the Secretary-General to circulate such comments and observations so as to facilitate a discussion on the subject at the forty-seventh session of the General Assembly;
>
> "4. Decides to establish at its forty-seventh session an open-ended working group of the Sixth Committee to examine, in the light of the written comments of Governments, as well as views expressed in debates at the forty-sixth session of the Assembly;
>
> "(a) Issues of substance arising out of the draft articles, in order to facilitate a successful conclusion of a convention through the promotion of general agreement;
>
> "(b) The question of the convening of an international conference, to be held in 1994 or subsequently, to conclude a convention on jurisdictional immunities of States and their property;
>
> "... ."

2. Pursuant to the above request, by a note dated 20 December 1991, the Secretary-General invited the Governments of Member States as well as of other States to submit the replies referred to in paragraph 2 of resolution 46/55.

3. The present report reproduces the replies that had been received as at 14 July 1992. Any further replies will be reproduced in addenda to the present report.

II. REPLIES RECEIVED FROM STATES

AUSTRALIA

[Original: English]

[13 July 1992]

1. Australia congratulates the International Law Commission on the final adoption of the draft articles at its forty-third session. Australia welcomes the draft articles as a valuable contribution to the development of the law in this area. However, it considers that some of the provisions could benefit from further improvement by the Working Group of the Sixth Committee.

2. In particular, Australia considers that the provisions of Part IV dealing with execution are not yet satisfactory. The purpose of the draft articles to give effect to a regime of limited immunity from jurisdiction would be rendered ineffectual in practice unless there is sufficient assurance that there will be compliance with judgements duly given in the exercise of the jurisdiction recognized by the draft articles. The provisions of Part IV fail to strike an adequate balance by making enforcement of final judgements too difficult.

3. The comments below concentrate on the main provisions which, in the opinion of Australia require further attention. The precise details of amendments to these and other provisions will need to be considered by the Working Group.

I. Comments on the draft articles

Part I

Article 2, paragraph 1: Definition of a "State"

4. Australia welcomes the inclusion of article 2, paragraph 1 (b) (ii), recognizing the constituents of a federal State as equivalent to a State itself. It considers that, the expression "representatives of the State" in article 2, paragraph 1 (b) (v), may need clarification to ensure that it is not confined to diplomatic or similar representatives but that it extends to all agents of foreign States acting in that capacity.

Article 2, paragraph 2: Definition of a "commercial transaction"

5. Australia considers that the reference to the purpose of a transaction in the circumstances proposed in article 2, paragraph 2, will create difficulties. How is a court of the forum State to determine the practice of the defendant State and how should it take such practice into account? Is the practice referred to the practice of the agency, instrumentality, subdivision

or representative, or is it the practice of the State as a whole? There is also the question of whether, if the forum State itself applies a purpose test, but the foreign State does not, the forum State is being invited to supply the less restrictive rules of the foreign State to the latter's disadvantage.

6. Australia would prefer a definition that relied primarily on the nature of a transaction. If purpose is to be taken into account, this should only be if the transaction itself when concluded so provides. If a State considers that the purpose of a transaction is relevant to determining its non-commercial character, then the State should be obliged to inform the other party to the transaction at the time it is concluded, so that party knows where it stands.

Article 4: Non-retroactivity of the present articles

7. Australia considers that the value of imposing this restriction on the operation of the draft articles is doubtful. As the time-limit relates only to the institution of proceedings, there is nothing (other than presumably a statute of limitations) to stop the plaintiff in such a proceeding from recommencing an action after the entry into force of the articles for the State concerned.

8. As far as the alternatives are concerned, the specific operation of the proposed articles could be restricted to disputes or facts or events giving rise to a proceeding which occur after the entry into force or acceptance of the articles by the forum State.

Part II

Article 6: Modalities for giving effect to State immunity

9. Australia considers that article 6, paragraph 2 (b), is too wide. Its effect is that a proceeding will be considered to have been instituted against a foreign State in cases where it could not be said that the State was a party to the proceedings but where a determination by the court affects "the property, rights, interests or activities of that other State". A narrower formulation would be preferable.

Part III

Article 10, paragraph 3: Immunity from jurisdiction and execution with regard to the acts of separate State entities

10. Australia agrees with the principle stated in article 10, paragraph 3, but considers that this principle is of general application in the area of State immunity, and is not limited to the topic of commercial transactions.

It should be stated as a generally applicable principle in Part II of the text, or as a savings clause in Part V of the text.

11. The wording of this principle ought to be modified to replace "other entity established by the State" with a reference to the various components of the definition of a State in article 2, paragraph 1 (b) (ii)-(iv). The immunity of the State itself should not be abrogated because a constituent unit of the federal State enters into a commercial transaction. Nor should the immunity of a constituent unit of the federal State be abrogated because the central Government or another constituent unit enters a commercial transaction.

Article 11: Contracts of employment

12. Australia believes that the language of article 11, paragraph 2 (a) and (b), is too broad. In particular, despite what is said in the commentary, it is not clear that article 11, paragraph 2 (b), would not exclude all cases of unfair dismissal. Australia considers that jurisdiction should be permitted in such cases, but that remedies other than monetary compensation should be excluded.

Article 16: Ships owned or operated by a State

13. Australia agrees that warships and government ships used exclusively on government non-commercial service are to enjoy a total immunity from suit. Article 16, paragraph 2, as presently drafted however, leaves the matter unclear. It should be redrafted along the following lines to spell out the immunity in specific terms:

> "Warships and other ships owned or operated by a State and used exclusively on government non-commercial service have complete immunity from the jurisdiction of the courts of any State or other than the flag State."

Article 17: Effect of an arbitration agreement

14. Australia considers that this provision is too narrow, in that it is limited to arbitration of differences arising out of a commercial transaction. Article 17 is concerned only with the supervisory jurisdiction of the court over the conduct of arbitrations, not the enforcement of the award. Since article 17 is specifically limited in this way, there is no need to confine it to arbitrations concerning commercial transactions, and it should be extended to include private law arbitrations generally.

Former article 16: Fiscal matters

15. Australia regrets the deletion of former draft article 16 dealing with fiscal matters, and would prefer its reinstatement.

16. Australia does not agree that it had no place in the draft articles because it dealt with State-to-State relations. The question of the immunity, if any, of a foreign State from the jurisdiction of the courts of the forum State in fiscal matters falls squarely within the subject-matter of the present draft articles.

17. Australia notes that the draft articles, as presently worded, would in some circumstances permit one State to bring an action against another State in a domestic court. Such an action could be brought under certain articles (for example, articles 13-16, although not under articles 10 or 17).

Part IV

Article 18: State immunity from measures of constraint

18. Australia considers that the provisions of Part IV suffer generally from a lack of detail.

19. In particular, article 18 should make a distinction between interim or prejudgement enforcement, on the one hand, and post judgement execution on the other. Considerably more protection is justified at the level of interim measures, where both the jurisdiction of a local court to deal with the merits of the case, and the merits themselves, may be contested. The seizure of State property, such as aircraft, can have a highly coercive and prejudicial effect, yet under the draft articles it will almost always be tangible property rather than funds that will be liable to be attached.

20. On the other hand, once final judgement has been given on the merits, in the exercise of jurisdiction recognized by the draft articles, the State's immunity from execution must not be so extensive as to be virtually complete. Otherwise, the old rule of absolute immunity - expelled from the front door - merely returns by the back door. As presently worded, the conditions for execution are so restrictive as to exclude the possibility of enforcement proceedings in many cases. Moreover, they would focus on attachment of tangible property rather than assets such as credit balances in bank accounts, whereas the seizure of tangible property is more likely to cause disruption to the normal activities of the foreign State.

21. Given that in many cases the foreign State will only have assets which are immune from execution in the territory of the State where judgement is given, the possibility of enforcement of judgements in the courts of third States is significant. The commentary to article 18, paragraph 1, makes it clear that such enforcement is possible. 1/ The possibility of third-State enforcement is of such importance in practice that the text of article 18 ought to state expressly that a judgement obtained in the courts of one State,

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1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), p. 136.

in the exercise of jurisdiction recognized by the draft articles, may be enforced in the courts of another State, in accordance with article 18 and subject to the private international law of the enforcing State.

22. Overall, articles 18, paragraph 1 (c), and 19 should clarify in greater detail the property that can be executed against as opposed to that which cannot.

23. Australia does not agree that article 18, paragraph 1 (c), should be limited to property having a connection with the claim which is the object of the proceeding. Many contractual disputes or delictual claims may have no connection with any particular property at all. The nature of the connection required is in any case too vague to be workable. Provided that measures of execution are limited to types of property used or intended for use for other than government non-commercial purposes, there should be no additional requirement of a connection with the subject-matter of the claim.

24. The present wording of article 18, paragraph 1 (c), suggests that no execution is possible against State property which is apparently vacant or not in use, and which cannot be shown to be intended for any particular use. Execution against such property should be permissible, unless it is shown that the property has been allocated for use for government non-commercial purposes (of the Australian Foreign States Immunities Act 1985, section 32 (3)).

25. The need for taking measures of execution would be reduced if a foreign State against which judgement was given in accordance with the draft articles was subject to an obligation to give effect to the judgement (as is the case under the European Convention on State Immunity). If the draft articles were to contain such a provision, Australia would not oppose the inclusion of a provision whereby all measures of constraint were prohibited for a specified period to enable the foreign State to comply voluntarily. However, where the foreign State fails to comply with the judgement within this period, effective measures of execution should still be available.

26. The issue of effective execution is one that needs considerable further attention. It is related to possible dispute settlement mechanisms, which are discussed below. Australia hopes to be in a position to put forward specific suggestions in the Working Group. Australia considers that unless the Working Group is able to improve the provisions of Part IV, the draft articles are unlikely to attract sufficient support to justify their adoption in the form of a convention.

Article 19: Specific categories of property

27. Australia considers that this article could be further qualified. For instance, there is no requirement in article 19, paragraph 1 (a) that the property be wholly or even substantially in use for diplomatic purposes. There is no clear justification for a complete immunity of central bank property, which may well be used for ordinary investment purposes.

Article 22, paragraph 2: Security for costs

28. Australia considers article 22, paragraph 2, to be unjustified. A State which commences proceedings as a plaintiff (or cross-plaintiff) should be liable to have those proceedings stayed if it does not comply with an order for security for costs.

II. Other comments

Settlement of disputes

29. Although the provisions of the draft articles are concerned with the jurisdiction of domestic courts, these provisions would, if embodied in an international convention, give rise to obligations between States in international law. In any case in which a domestic court assumed jurisdiction over a foreign State, a genuine disagreement could arise between the foreign State and the forum State whether or not the foreign State was entitled to immunity or to particular privileges under the convention.

30. Depending on the constitutional law of the forum State, it may be possible for the disputes to be resolved by negotiation between the Governments of the forum State and of the foreign State.

31. If the dispute is not resolved, the foreign State might boycott the proceedings and refuse to recognize any judgement given against it. If the foreign State has no assets in the territory of the forum State, the judgement might remain unsatisfied. If execution were levied against commercial property of the foreign State situated in the territory of the State of the forum, the defendant State might take retaliatory action against assets of the forum State located in the defendant State's territory. This would defeat the purpose of the convention.

32. If the draft articles are embodied in a convention, it is therefore desirable that the convention should include some mechanism for the resolution of disputes between States Parties concerning its proper interpretation and application. At this stage, Australia expresses no view on what would be the most desirable mechanism, other than that it should be speedy and effective. Proceedings in the International Court of Justice may be too slow and expensive for this purpose, especially in the case of relatively minor claims, although the Permanent Court of International Justice did play this kind of role in giving its advisory opinion in Jurisdiction of the Courts of Danzig (1928) Ser.B, No. 4. Consideration could be given to establishing a special tribunal, as was done by the Additional Protocol to the European Convention on State Immunity. The appointment of ad hoc conciliation commissions, as previously provided for in draft article 30 and the annex, proposed by the Rapporteur, may be the most expedient solution.

33. The dispute settlement mechanism should permit disputes to be solved where possible at a preliminary stage, before determination of the merits or

giving of judgement. Some disputes - for example, those relating to the execution provisions - will obviously only arise after judgement is given.

34. At the same time, the situation should be avoided in which every domestic proceeding under the convention is preceded by proceedings on the international plane to determine the effect of the draft articles.

Relationship of the draft articles to other international agreements

35. Australia considers that the draft articles should state expressly that the principles they embody are subject to other international agreements concluded by States. They should not, however, be stated to be subject to the relevant rules of international law in general. Australia supports the deletion of this phrase from former draft article 5.

36. For instance, in any situation in which one State permits the agents of a foreign State to enter its territory, there may be reasons why the receiving and sending States agree on an ad hoc basis that the regime of immunities of the sending States in respect of the acts of its agents should be different to the regime contained in the draft articles.

37. Similarly, there is no reason why groups of States should not agree to apply as between themselves a general regime of foreign State immunity different to that contained in the draft articles. The law in the area of State immunity has undergone considerable evolution over recent decades, and this evolution should not be considered complete. The present draft articles should not have the effect of ossifying the law in this area. Rather, they should embody a general regime, which certain States can, by agreement, develop further in other bilateral, regional or multilateral arrangements. Developments and experiences of States in implementing agreements of this type could eventually be taken into account in any subsequent revision of the draft articles.

Procedural issues

38. Australia looks forward to participating in the Working Group on Jurisdictional Immunities of States and their Property at the forty-seventh session of the General Assembly. In the event that the Working Group is able to reach agreement on a final text, Australia believes that the text could be submitted for adoption to the General Assembly, and that a diplomatic conference would thus not be necessary.

AUSTRIA

[Original: English]

[9 July 1992]

I. GENERAL REMARKS

1. As Austria has stated over the years during which work on this subject was going on, both in written comments on the subject and in statements before the Sixth Committee, that on the whole, it considers satisfactory the general approach the International Law Commission has taken on the subject of jurisdictional immunities of States and their property. Recent developments that are having a profound effect on the national economies of some States as well as the intensification of international trade relations have shown that the view expressed by Austria from the outset, namely that rules of international law relating to State immunity should be conducive to an expansion of economic relations between States and not hamper development, was correct.

2. The views held by the members of the international community on the subject of jurisdictional immunities of States and their property are by no means uniform. The International Law Commission has, however, been remarkably successful in bridging the gap between the two main schools of thought - absolute versus restricted State immunities - and has presented a solid basis for the elaboration of an international instrument on the subject-matter.

II. PROCEDURAL QUESTIONS

3. As to procedural aspects, Austria wishes to refer to the recommendation made by the International Law Commission in the report on its forty-third session that an international conference of plenipotentiaries be convened to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on this subject. 1/ This recommendation has also been reflected in the mandate given to the working group of the Sixth Committee by General Assembly resolution 46/55.

4. In the view of Austria, such a conference would be the most appropriate forum to deal further with the draft articles. First, the subject-matter requires a great amount of expertise which may not only be found in foreign ministries, but also in other government departments, particularly in ministries of justice. A substantive consideration of the draft articles would therefore appear to require, in addition to the deliberations in a working group of the Sixth Committee, a broader basis than that which

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1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II, para. 25.

delegations to the General Assembly could probably provide. Furthermore, a concerted effort by representatives of Governments within a limited period of time would seem to offer better prospects of concluding a final text than an endeavour by a working group of the Sixth Committee, which should rather provide the preparatory basis for such a conference.

5. Austria therefore believes that the General Assembly at its forty-seventh session should take a decision on the question of holding a codification conference. In the light of the debate in the working group of the Sixth Committee on important points raised by Governments in their comments, a codification conference could be convened for the spring of 1994. It has to be emphasized that Austria would only regard a codification conference a true success if its results were acceptable to all segments of the international community. In this context, Austria would also like to refer to the long-standing tradition of the Austrian capital as the venue of codification conferences.

III. OBSERVATIONS ON CERTAIN DRAFT ARTICLES

Part I

Draft article 2

6. The provision in paragraph 1 (b) (iv) could create difficult problems of interpretation. Austria would therefore prefer that this provision be deleted. In paragraph 1 (c) of this article, the term "contract" would seem preferable to the term "transaction", as it is part of many legal systems and therefore - contrary to "transaction" - clearly has a precise legal connotation.

7. As to paragraph 2 of this article, Austria wishes to reiterate its preference for the exclusion of the criterion of purpose when determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c) of this article. A restriction to the nature of a transaction could avoid possible subjective interpretations which could in certain cases aim at escaping jurisdiction.

Part II

Draft article 7

8. Austria has a preference for the deletion of the reference to a written contract contained in paragraph 1 (b) of this article. That reference would give a State the possibility to relinquish a right under international law by way of a contract subject only to municipal law.

9. As to the article on nationalization, which was contained in earlier drafts but has been deleted, Austria believes that an international instrument

on State immunities should contain a general reservation concerning matters regarding the extraterritorial effects of measures of nationalization. Many legal systems are based on the principle of territoriality. Thus, measures of confiscation, including nationalization, cannot be extended to property situated outside the territory of the confiscating State. Austria would therefore favour the reintroduction of a provision on nationalization.

Part III

10. As regards the title of Part III, Austria has a preference for the use of the term "limitations on State immunities". The compromise solution which has been proposed by the International Law Commission could, however, meet the concerns of both schools of thought.

Draft article 11

11. This provision is the expression of the ample evidence of the inclination of national courts to assume jurisdiction in cases involving labour law disputes and the willingness of States to submit them to such proceedings. Austria therefore attaches importance to this provision.

Draft article 12

12. The retention of this article is essential to Austria, as such cases cannot always be easily settled through diplomatic channels. In the view of Austria, as a matter of human rights law, individuals must have some effective legal recourse. A similar provision can also be found in the European Convention on State Immunity.

Draft article 16

13. Austria welcomes the inclusion of a provision relating to the pollution of the marine environment.

Draft article 17

14. As to the first part of the chapeau, Austria would have a preference to replace the expression "commercial transaction" by the term "civil or commercial matter". In the last part of the chapeau, the International Law Commission has opted for the expression "a court of another State which is otherwise competent". Austria holds the view that the formula used in the European Convention on State Immunity might have merits in the context of arbitration procedures. Austria would therefore have a clear preference for a formulation which would read "a court of another State in the territory or according to the law of which the arbitration has taken or will take place".

Part IV

Draft article 18

15. Austria welcomes the merger of former articles 21 and 22 in one single provision. Austria supports the concept that allows measures of execution against the property of another State even without their express consent, as this would be a further element limiting State immunity. No further conditions should be attached to the possibility of taking measures of execution such as the requirement stipulated in paragraph 1 (c) of this article, that there be a connection "with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed". The restriction contained in the first part of subparagraph (c) in this article, according to which no measure of constraint may be taken in connection of a proceeding before a court of another State unless and except to the extent that the property is specifically in use or intended for use by the State for other than non-commercial purposes and is in the territory of the State of the forum, should suffice in this connection.

Draft article 19

16. Austria suggests that in paragraph 1 (d) and (e) the expression "property" be supplemented by the term "public". A clarification in this respect would seem useful and corresponds to the intention expressed by the International Law Commission in previous reports.

17. As far as paragraph 1 (c) of this article is concerned, the term "monetary authority", in the view of Austria, lacks a precise definition and should therefore be deleted. It seems sufficient to exempt property of the central bank.

Part V

Draft article 20

18. With respect to the question of translation, Austria strongly favours the deletion of the phrase "if necessary" in paragraph 3 of this article, in particular as it is not clear who is to decide whether the translation of a document is necessary. Austria believes that a document should in any case be accompanied by a translation if it is not written in the official language or one of the official languages of the State concerned.

Draft article 21

19. The time-limits in the context of default judgements in paragraphs 1 and 3 of this article have - compared to earlier drafts - been extended from three to four months, the reason for which is not obvious. Austria would therefore prefer a period of three months as the time-limit.

Draft article 22

20. Austria notes that a clear obligation of the foreign State to assume the costs for the proceedings is still lacking. Such an obligation would, however, constitute a necessary corollary to the exemption of the foreign State from the requirement to provide any security, bond or deposit to guarantee the payment of judicial costs or expenses.

BRAZIL

[Original: English]

[7 July 1992]

1. The draft articles on the jurisdictional immunities of the States and their properties drawn up by the International Law Commission do not coincide in many points with the traditional positions of Brazil on the matter, revealing, in fact, marked differences from those positions in substantial portions. Nevertheless, the Brazilian Government recognizes that the draft reflects a major effort aiming at setting up, on matters of immunity, a regime that, by harmonizing different positions, might have universal applicability, thus avoiding a situation of uncertainties and conflicts which does not favour a good international order.

2. The following points of the draft are particularly positive in the view of the Brazilian Government:

(a) The fact that, besides its nature, the purpose of a contract or transaction may be taken into account to determine the commercial or non-commercial character of the contract or transaction (art. 2, para. 2);

(b) The deletion, in article 5, of the expression "the relevant rules of general international law", which was contained between brackets on the text adopted on first reading. The keeping of this expression would have improperly enlarged the possibility of new exceptions to the rule of immunity, restricting the scope of the instrument which is intended to be adopted;

(c) The fact that article 6 enshrines the obligation of States and their tribunals to respect the basic rule of immunity, independently of the action to be taken by the State which enjoys immunity;

(d) The explicit acknowledgement that, in counter-claims matters, the extent of jurisdiction can only be applied to matters arising out of the same legal relationship or the same facts (art. 9);

(e) The requisite that, in order for a property of a State to be subject to arrest or other measures of constraint, it is necessary not only that this property is being used for commercial purposes, but also that it is connected

to the claim which is the object of the proceeding or to the agency or instrumentality against which the proceeding was directed (art. 18, para. 1 (c)).

3. The Brazilian Government considers that it is possible to reach an agreement on these and other issues on which Brazil or other Governments confer particular importance, through negotiations conducted in a constructive manner be it at a working group set by the Sixth Committee or at an international conference.

4. It is, however, necessary to analyse whether some provisions of the draft articles really reflect a balance between opposite trends, namely between the limitation and the enlargement of immunity - and from which point they tend to an excessive limitation of immunity.

5. Some particular provisions still deserve careful examination:

(a) Article 2, paragraph 1 (a), of the draft does not expressly exclude criminal proceedings from the scope of the articles, although in its commentaries the International Law Commission has clarified that "although the draft articles do not define the expression proceedings it should be understood that they do not cover criminal proceedings". 1/ In this respect, this clarification should not only be part of the commentaries but also of the draft itself. We should also note that the expression "State" encompasses individuals, though only those acting as "representatives of the State" (art. 2, para. 1 (b) (v));

(b) The difficulties arising from the draft are found, in particular, in article 10. Supporting the theory that grants immunity only to the acta jure imperii of the State and not to the acta jure gestionis, it establishes the non-immunity in proceedings related to "commercial transactions". This expression replaces the term "commercial contracts" that appeared previously in the text and that limited significantly the extent of this exception to the State immunity. Furthermore, paragraph 1 of the article ultimately means that, under applicable rules of private international law, the foreign State may consider itself competent to judge the commercial transactions and, consequently, the State (Brazil) "cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction", even if it considers itself competent by the applicable rules of private international law. On the other hand, paragraph 3 of the same article enlarges even more the sphere of jurisdiction of a foreign State. Regrettably, article 10 envisages neither the crucial issue of external debt nor is any benefit of immunity given to a State unable to repay it. However, this benefit is to some extent reflected in the Hamburg Project of the Institut de Droit International reviewed in 1892, in the 1932 Project of the

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1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II, p. 13.

Harvard Law School, and more recently, in the draft of the Inter-American Juridical Committee and in the working group of the Committee on Political and Juridical Affairs of the Organization of American States;

(c) The possibility, left open by article 21, of a default judgement of a State, although not exactly constituting an exception to the right of immunity, should be carefully examined in the light of the problems that it could create for the exercise of this right;

(d) The draft confers upon the arbitration agreement in some cases (art. 17 and art. 18, para. 1 (a)), the possibility of a waiver of immunity even if the parties, upon signature, made no agreement in this respect. In practical terms, this would mean conferring to the manifestation of will of a State, upon signature of the agreement, legal consequences which have not necessarily been envisaged by it. In order to eliminate inappropriate assumptions, it should perhaps be established that the immunity of the State might only be waived when it is expressly foreseen by the arbitration agreement.

6. Lastly, it should be noted that Brazil supports the convening of an international conference of plenipotentiaries in order to examine the draft of articles and conclude a convention on this matter. Nevertheless, the Brazilian Government does not have objections that the draft be further discussed by the International Law Commission before a conference is convened.

CUBA

[Original: Spanish]

[9 June 1992]

1. With regard to the draft articles on jurisdictional immunities of States, the Government of Cuba believes that they can constitute an excellent basis for the negotiations leading to the adoption of a legal instrument in this area.

2. While the Government of Cuba is of the view that the draft articles generally fulfil the purposes for which they were designed, it none the less believes that some changes would be appropriate for the purposes of greater clarity, and in order to facilitate better understanding and stricter application of the draft articles by various States. This is particularly important since what is involved is a set of norms which, because of their nature, will not give rise to further regulation.

3. Accordingly, the Government of Cuba approves of the decision adopted by the General Assembly in its resolution 46/55 to establish an open-ended working group of the Sixth Committee to examine, in the light of the written comments of Governments, issues of substance arising out of the draft articles. This will contribute to the adoption of a legal instrument which can be universally acceptable and, ultimately, more effective.

4. Once this exercise has been completed, it should be possible to decide on the question of the convening of an international conference to conclude a convention on jurisdictional immunities of States and their property, which would be of genuine interest to the international community.

DENMARK*

[Original: English]

[11 June 1992]

1. In the opinion of the five Nordic countries, the draft articles adopted by the International Law Commission form a solid basis for consideration at a diplomatic conference to draw up a convention on this topic. In accordance with the general trend in current international law on State immunity as reflected in the draft articles, the aim of the convention should be to draw workable lines of distinction between activities of States performed in the exercise of sovereign authority, acta jure imperii, which should continue to be covered by immunity, on the one hand, and State activities, acta jure gestionis, which should not be covered by immunity due to their commercial character or other adherence to the province of private law, on the other. A functional approach should be adopted in this respect.

2. Furthermore, it is considered of the utmost importance that general agreement be secured on most procedural questions, and to the extent possible on the basic substantive issues, before an international conference is convened. In this regard the Nordic countries are ready to participate actively in the work of the open-ended working group of the Sixth Committee, which shall consider issues of substance and procedural matters regarding the conclusion of a convention on jurisdictional immunities of States and their property.

SPAIN

[Original: Spanish]

[9 July 1992]

1. In the view of the Spanish Government, the draft articles as a whole could constitute an acceptable basis for a conference of plenipotentiaries to adopt, at the appropriate time, an international convention in this field. However, only when the comments and replies received from other Governments indicate a significant degree of consensus would it be appropriate to convene such a conference.

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* On behalf of the Nordic countries.

2. With regard to article 3, paragraph 2 ("Privileges and immunities not affected by the present articles"), the Spanish Government reiterates the observation which it made in its comments on article 4 of the draft provisionally adopted by the Commission at its thirty-eighth session (A/CN.4/410, p. 38). In that comment, the Spanish Government suggested that it might be appropriate to mention not only the privileges and immunities accorded under international law to foreign heads of State, but also those accorded to heads of Government, Ministers for Foreign Affairs and persons of high rank. The Commission did not believe that it would be appropriate specifically to include such persons in article 3, paragraph 2, of the final draft articles "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues on the basis and of the extent of the jurisdictional immunity exercised by such persons". 1/ In the view of the Spanish Government, however, the purpose of article 9 is to protect those privileges and immunities already recognized under international law, not to regulate or prejudge the basis and extent of such privileges and immunities. Moreover, protecting the privileges and immunities of heads of State and not those of heads of Government and Ministers for Foreign Affairs could cast doubt on whether the persons in the latter two categories really enjoy privileges and immunities. To mention these persons in a saving clause would seem more neutral than to omit them.

3. Article 11, paragraph 2 (b), establishes immunity from jurisdiction where "the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual".

4. In Spanish law, however, if an employer dismisses an employee without due cause, the recourse available to the employee under the law is to bring an action for "wrongful dismissal". If the labour court finds that the dismissal was indeed wrongful, the employer has to choose one of the following alternatives: reinstatement or compensation. In other words, the object of this labour proceeding is the reinstatement of the employee or the payment of compensation, as the employer chooses.

5. Consequently, if article 11, paragraph 2 (b), were to be included in a convention applicable to Spain, the competent labour court that heard a suit brought against a foreign State for wrongful dismissal would have to declare itself incompetent, since the proceeding could end in the reinstatement of the individual. In other words, since the only action at law available to the employee recruited by a foreign State is for wrongful dismissal, and since such an action could lead to reinstatement or compensation, the proceeding in question would be subsumable under article 11, paragraph 2 (b), of the future convention, and the labour court would have to declare itself incompetent. Such a declaration of incompetence would be contrary to the line maintained by Spanish judicial practice since 1986.

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), p. 36.

6. The Spanish Government naturally shares the Commission's philosophy, stated in the commentary, that the discretionary power of appointment or non-appointment by the State of an individual to any post closely related to the exercise of governmental authority must be supported by the rule of jurisdictional immunity. This, however, does not apply to the obligation of such a State to pay appropriate compensation for wrongful dismissal. Since in Spanish law reinstatement and compensation are the subject of the same court proceeding, this factor must be taken into account so as not to exclude questions of compensation from the jurisdiction of the State of the forum.

7. The Spanish Government is of the view that these consequences could be avoided if article 11, paragraph 2 (b), were drafted as follows:

> "The subject of the proceeding is recruitment or renewal of employment, or if it concerns only the reinstatement of an individual."

8. It is obvious that it would be for the judges and courts of the State of the forum to determine in the first place whether, in accordance with the provisions of the proposed convention, there is or is not in each specific case immunity from jurisdiction. But such determination may give rise to differences with the foreign State in question. Differences of this kind would normally constitute an international dispute, for the settlement of which the Spanish Government considers it appropriate to establish international mechanisms with binding jurisdiction for final arbitration (recourse either to the International Court of Justice or to an arbitral body). This question should be dealt with at the prospective conference of plenipotentiaries.

SWITZERLAND

[Original: French]

[30 June 1992]

I. GENERAL COMMENTS

1. This set of draft articles adopted by the International Law Commission at its forty-third session is, on the whole, a significant improvement over the first draft, adopted by the Commission on first reading in 1986, at its thirty-eighth session. The Swiss Government has noted with satisfaction that some of the comments it made with regard to the 1986 draft (A/CN.4/410) have been taken into account in the preparation of the new text.

2. This does not mean that the Swiss authorities believe that the text needs no further improvement. They remain concerned about the treatment given to immunity from execution. The Swiss Government can only reiterate and reaffirm its comments on articles 20 to 23 of the first draft, which have become articles 18 and 19 of the current text. These rules, already quite restrictive in their first version, have become even more so in the second,

with the addition of the qualifier "in particular" to article 19, paragraph 1, listing State property protected from execution. They ignore the fact that, since both types of immunity are not fundamentally different, limits imposed on immunity from jurisdiction should also restrict immunity from execution.

3. Furthermore, the Swiss Government finds it difficult to support the Commission's conclusion that the question of the settlement of disputes

> "could be dealt with by the above-mentioned international conference, if it considers that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles". (A/46/10) 1/

Indeed, there is hardly any doubt that such a mechanism would prove necessary if a convention were to see the light of day. Perhaps as a result of internal disagreement, the Commission has resigned itself too quickly to the idea of abandoning the study of a question that will undoubtedly be raised at the forthcoming conference. In the absence of adequate preparatory work on this point - the former Special Rapporteur, Mr. Sompong Sucharitkul, had, nevertheless, proposed five articles concerning the peaceful settlement of disputes 2/ - this conference stands to lose precious time. The same criticism also applies to the draft articles on the law on the non-navigational uses of international watercourses (A/46/10, chap. III, sect. D.2) on which the Swiss Government will comment later.

II. OBSERVATIONS ON SOME PROVISIONS OF THE DRAFT ARTICLES

Article 2, paragraph 1 (b) (ii)

4. The addition to the definition of "State" of a reference to "constituent units of a federal State" (Would it not be clearer and more accurate to say "constituent entities"?) apparently covers the components of federal States which, since they do not exercise the prerogatives of sovereign authority, would not be covered by item (iii) of the definition ("political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State"). Is it appropriate to include in the definition of the term "State" and, by extension, in the regime of immunity from jurisdiction entities which do not exercise governmental functions?

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II, para. 26.

2/ Ibid., Forty-fourth Session, Supplement No. 10 (A/44/10), chap. VI, para. 611.

Article 2, paragraph 1 (c), and paragraph 2

5. It is right to define the expression "commercial transaction" here, because it is used in draft articles 10 and 17; moreover, article 10 is one of the key provisions of the entire text. Unfortunately, this expression is in some measure defined in terms of itself ("commercial transaction means: (i) any commercial contract or transaction"). Would it not be preferable to use the term "contract or other juridical act of a commercial nature" in items (i) to (iii) of paragraph 1 (c) and in paragraph 2?

6. It is still regrettable that the term "interest", which is used in several places, for example, article 13, and is extremely vague, is not defined anywhere. A simple solution to the resulting problem would be to replace the word "interest" each time it appears with the word "right", since, as everyone knows, "rights" are "legally protected interests".

Article 5

7. In the words of this article, "a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles". This formulation raises two questions: first, whether the phrase "subject to the provisions of the present articles" is legally accurate, and whether it would not be better to replace it with the formulation "as provided under the present articles"; secondly, whether the Commission was right to delete the phrase "and the relevant rules of general international law" found in brackets in the first draft. Upon reflection, the deletion of those extra words seems justified. If the Commission's draft articles were to take the form of a treaty, the phrase in question could suggest that States parties to the treaty could always invoke so-called general rules to avoid applying the treaty. The idea which that phrase purports to express could be preserved, if need be, by including in draft article 1 a paragraph specifying that, where the draft does not govern a given point, the rules of general international law may be invoked.

Article 8, paragraphs 3 and 4

8. Paragraph 3 of article 8 specifies that the appearance of a representative of a foreign State before a local court does not amount to implicit consent to its competence to the extent that the representative appears "as a witness". This clarification, though not essential, is wise, as is the clarification found in paragraph 4 (formerly para. 3 of art. 8): the default (why "failure to enter an appearance"?) of a foreign State does not constitute consent by that State to the jurisdiction of the court. But is it not odd to address default - a case of non-participation in an existing proceeding - in a provision entitled "Effect of participation in a proceeding before a court"? The title of article 8 should be worded more neutrally.

Article 10, paragraph 3

9. Article 10, paragraph 2 (a), excludes from the jurisdiction of national courts "commercial transactions between States". In its previous observations, the Swiss Government had found that exclusion too broad, for it would have encompassed all the commerical transactions arising between a State and a body of another State, or between bodies of different States. In accordance with the wish expressed at that itme, the scope of the exclusion has been reduced, in the new draft, by the addition of a paragraph 3 which protects from jurisdictional immunity commercial transactions engaged in by enterprises or other State entities with a legal personality independent of the State and with the legal capability to enter into commitments under private domestic law.

Article 11, paragraph 1

10. The first version of this provision, concerning contracts of employment concluded between a State and an individual for work to be performed in the territory of a third State, imposed the double condition of the individual's recruitment in the territory of the third State and enrolment in its social security system. This requirement has been eliminated, which means that the scope of immunity from jurisdiction has been narrowed in the area of employment relations. This change appears wise.

Article 11, paragraph 2 (a) and paragraph 2 (c)

11. Still in the field of employment relations, the same restrictive tendency characterizes the definition of the various situations not addressed by local courts by reason of the immunity of the foreign State concerned. Among them is the situation - see paragraph 2 - of the employee "recruited to perform functions related to the exercise of governmental authority" (old version), or "recruited to perform functions closely related to the exercise" of this authority (new version). The new wording seems preferable, although the adverb "closely" could well be replaced by "directly". Paragraph 2 (c) continues to list among the cases of immunity those of employees who, at the time of their recruitment, were neither nationals nor "habitual residents" of the forum State. The Swiss Government continues to have misgivings about that expression, apparently not shared by the Commission, and continues to suggest a return to the term "permanent resident" used in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on Special Missions.

Article 13

12. See the observation on the term "interest" in the commentary on article 2 of the current draft.

Article 16

13. It should be noted, in regard to this provision concerning ships owned or operated by a State, that no provision is made for immunity from jurisdiction for aircraft and their cargo or for space objects. This question, nevertheless, was discussed in the Drafting Committee and referred to in the Commission (see A/CN.4/SR.2221). Paragraph (17) of the commentary limits itself to the statement that article 16 does not deal with those matters, because their examination would have required more time and study (A/46/10, chap. II, para. 24). This explanation is unsatisfactory. These matters call for regulation, as emphasized by the Swiss Government in its observations on the first draft (A/CN.4/410).

Article 19, paragraph 1 (a)

14. Article 19 of the new draft lists property protected from execution, including property and bank accounts used for the purposes of a diplomatic mission or consular post (para. 1 (a)). The Swiss Government had suggested during the examination of the first draft that it should be specified that, to remain covered by immunity from execution, the property or assets in question must be clearly attributable to the foreign State concerned. Neither the text of article 19 nor the Commission's commentary reflects that suggestion.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

[10 July 1992]

1. The comments that follow are intended to point the way towards achieving a widely accepted international convention on the subject.

2. In the opinion of the United Kingdom, the present provides an ideal moment for the pursuit of the final phase of the work on the subject. Recent political changes in the world have brought with them attendant economic reforms. These are still continuing. They offer, however, a rare opportunity to arrive at a genuine international consensus on the subject of State immunity, so as to reflect the real conditions of the commercial and financial market-place in which States and their enterprises operate. The aim must be to establish on a long-term basis common rules in this area which are fair both to States and to those who do business with them. The United Kingdom has assessed the draft articles in this light.

3. In the United Kingdom's considered view, the issues of principle that remain to be resolved, on the way to a generally acceptable convention, can be reduced to no more than four or five. They are:

(a) The definition of a State;

(b) The scope and definition of "commercial transaction";

(c) Segregated State property;

(d) Measures of constraint;

(e) Mixed funds.

4. These issues of principle are dealt with in greater detail in paragraphs 7-17. While there remain numerous other points of detail, these are less substantial. The United Kingdom prefers to reserve its views on them until a later stage, when the negotiation of a convention has begun. For the meanwhile, its previous written and oral comments on these points stand, except to the extent that they have been accommodated in the dfaft articles as put forward in their final form by the International Law Commission.

5. As to the procedure to be followed, the United Kingdom is firmly of the view that the convening of an international plenipotentiary conference must be preceded by adequate preparation. This is necessary both on grounds of cost-effectiveness and in order to guarantee a successful outcome. In the present instance the United Kingdom believes that the quality of the result far outweighs in importance a rigid timetable for its achievement. It would accordingly be in favour of instituting a systematic programme of further consultations between Governments preparatory to a decision on the convening of an international conference and its timing. The working group of the Sixth Committee, provided for in paragraph 4 of General Assembly resolution 46/55, is an ideal vehicle to begin this process. Such further consultations should, however, be specifically directed to the outstanding issues of principle. For this purpose it is essential to identify these issues of principle in advance (though expressly without prejudice to the right of any Government to raise any issue it chose at an eventual international conference). The United Kingdom would accordingly propose that work on the item in the Sixth Committee at the forty-seventh session should be focused on identifying the key issues and starting the process of intergovernmental consultation on them.

6. The present comments and observations should be seen as a contribution to that process.

Main issues of principle on the draft articles

Definition of the State

7. The reason why international law denies a State the right to exercise jurisdiction over a category of defendants present in its territory or undertaking activity there is expressed in the maxim par in parem non habet imperium. It follows that the notion is bound up, not with how closely the activities of the defendant are connected with a foreign State, but rather with whether the defendant itself forms part of what should be properly understood as the foreign State.

8. The International Law Commission proposes to deal with the wide variety of particular defendants who might be cited in foreign proceedings through a five-part definition of "State", contained in draft article 2. Three of those parts are uncontroversial, and indeed largely self-evident (although greater attention may be needed to the way in which the draft deals with the case of federal States). Subparagraphs (iii) and (iv) however (political subdivisions and agencies and instrumentalities) give rise to continuing difficulties.

9. To a certain extent this is a matter of the drafting technique employed. Underlying it however is the much deeper issue of the proper limits of the State in the specific context of jurisdictional immunities. Given the wide freedom of choice enjoyed by States as to the manner in which they engage in their commercial and other activities there is an obvious question to be posed about how far the jurisdictional immunity conferred by the international law attaches to entities separate from the State itself unless they are, in a genuine sense, the State's alter ego. The draft article quite properly raises the issue whether a separate entity may attract immunity in some circumstances but not in others. The approach is certainly a potentially valid one - though it tends to detract from the fact that the immunity in question is essentially a quality derived from the sovereign legal personality of the State. Nevertheless, the differing ways in which the draft handles political subdivisions, on the one hand, and agencies or instrumentalities, on the other, are not satisfactory on the general plane, and even less so when translated into its procedural and substantive consequences in provisions such as article 6 (Duty of the courts to give effect to immunity on their own initiative) and article 20 ("Service of process"), or article 11 ("Contracts of employment"). The entire approach to the definition of a State may need reconsideration.

Scope and definition of "Commercial transactions"

10. The enjoyment or absence of immunity does not turn entirely on whether a transaction is to be characterized as commercial or non-commercial. Nevertheless, the "commercial"/"non-commercial" divide represents one of the principal features in the scheme of the law as laid out in the draft articles. However, all of the interests consulted by the United Kingdom Government, without exception, found the dual criterion adopted by the Commission to be profoundly unsatisfactory. It was felt, variously, to create uncertainty for the private litigant and for business interests generally; to give rise to a possible distortion of the intention of the parties in choosing the proper law of the transaction; to create unjustifiable inequalities between the parties to a given transaction; to raise difficulties for the burden of proof; and to add an undesirable qualification to the examples of commercial transactions specifically listed in draft article 2. In addition, criticism was voiced of the dual employment of the commerical criterion both in the rubric to paragraph 1 (c) and in two of the cases listed under the rubric.

11. It is crucial to the success of the draft articles that the issue be resolved in a generally acceptable and also practically workable manner.

Segregated State property

12. Apart from certain problems of drafting, draft article 10 (3) raises a serious problem at the level of principle. It is not immediately evident from the text of the provision itself but emerges clearly from the commentary, which indicates also the controversy to which earlier versions of this provision have given rise in the past.

13. The United Kingdom has no difficulty with the principle that a State possesses a wide freedom of choice over how to organize its trading, commercial or other activities. What the United Kingdom finds hard to accept however, as a matter of principle is the possibility left open by the draft articles:

either

- that a State may set up and operate through a separate trading agency but that such an agency may nevertheless, despite its inherently commercial character, be entitled to raise a plea of State immunity;

or

- that a State, while operating through a separate trading agency, may nevertheless so organize the holding of assets that in effect no assets are ever available that can be attached.

14. It would seem that the concept reflected in draft article 10 (3) is inspired by a form of State economic organization that is rapidly becoming a thing of the past. Moreover, as the concept runs counter to the general scheme of the draft articles, the United Kingdom does not see any justification for retaining it.

Measures of constraint

15. The problem area here relates not merely to execution and enforcement of a judgement, but also to saisie conservatoire in its various forms, which represents an increasingly important aspect of commercial law and practice in an era of easy and rapid transfer of funds and other assets from one jurisdiction to another. It may go further still, and affect the existence vel non of immunity altogether, depending on the proper interpretation to be given to draft article 6. The United Kingdom is satisfied that no codification of the topic will be acceptable which does not provide a proper basis on which national legislation may regulate (consistently with the procedural rules normally applied by the national courts) first, the process by which competence to hear a matter is established and secondly, the satisfaction of judgements handed down by the national courts in cases where it has been established that there is no immunity.

16. It should not be the aim to regulate these matters in detail in a convention. The task is better left to national implementing legislation, which will adapt itself to the procedural aspects of litigation in the particular jurisdiction in question. Unless, however, a proper basis is laid for this to be done, the outcome will not be a practically effective regulation of the question of State immunity.

Mixed funds

17. Draft article 19 raises a number of difficulties at the level of principle. Article 18 is intended to describe a category of State property that is open, inter alia, to measures in execution of a valid judgement in a non-immune matter, without requiring the specific consent of the (non-immune) defendant. Article 19 immediately qualifies this by excluding certain categories altogether from the possibility opened by article 18 (1) (c). It is questionable whether the combined effect of the two provisions is not, contrary to the draftsman's intention, to impose a rule of absolute immunity for State property, except where the express consent of the defendant State has been obtained. The United Kingdom finds the regime of these two articles unsatisfactory, in that:

(a) It fails to identify any positive characteristic of property which makes it available for attachment;

(b) It fails to offer adequate guidance as to what constitutes the "State" for the purpose of giving consent to measures (where such consent is needed) in the wide range of factual circumstances likely to be encountered;

(c) It excludes absolutely a number of categories of property without any sound basis in State practice;

(d) It fails to provide adequate guidance as to what should be regarded as the property of a central bank or other monetary authority, given that in many cases the assets of a central bank are represented by accounts in the books of other banks, and given also that the origins of central bank funds are diverse and that the purposes for which they are to be used are varied, and often mixed;

(e) It fails to deal expressly with the status of mixed funds more generally, which has arisen in at least one case before the English courts.

UNITED STATES OF AMERICA

[Original: English]

[10 July 1992]

1. In our prepared remarks in October 1991, we praised the significant progress the Commission had made from the first reading in reflecting the "restrictive theory" of sovereign immunity. We noted, however, that before

the United States could support a diplomatic conference to consider adoption of a convention on this subject, significant problems needed to be resolved. In this connection, for example, we draw particular attention to article 2 to the subsidiary "purpose" test for determining whether a contract or transaction is "commercial", which in the view of the United States represents a significant departure from the restrictive theory of sovereign immunity (see paras. 6-8 below). In view of such concerns, the United States supported the Government of Mexico's proposal to establish a working group of the Sixth Committee in an effort to resolve remaining issues.

2. There have, of course, been substantial political and economic changes in the world over the past few years. (We note that the Commission's commentary to the draft articles repeatedly refers to "socialist systems" that, for the most part, no longer exist.) We believe that current realities dictate that the working group should focus on a preliminary examination of comments of Governments on the draft articles.

3. The United States may wish to provide further observations on the draft articles in the context of their consideration by the working group of the Sixth Committee.

Comments on specific articles

Article 2 - Use of terms

4. Paragraph 1 (b) (ii) includes in the definition of "State" the "constituent units of a federal State". While the commentary indicates that federal States differ in their constitutional practice and historical background with respect to their treatment of "constituent units" (A/46/10), 1/ it would be helpful to explore further the particular kinds of entities intended to be encompassed within that term.

5. Paragraphs 1 (b) (iii) and (iv) refer to political subdivisions and agencies or instrumentalities that are "entitled to perform acts in the exercise of the sovereign authority of the State". It should be made clear that the issue is not simply one of "entitlement" alone, but that the entity must also in fact be performing acts in such capacity in the particular case. (For example, an entity may be "entitled" to perform certain functions which in fact it is not exercising in a given situation.) Beyond this, however, we wish to note the uncertain scope of the term "sovereign authority". We believe that additional exploration, especially of the situation of those agencies and instrumentalities that perform mixed functions - for example, some "private" and some "sovereign" - would contribute not only to an assessment of the adequacy of the draft's treatment of such entities, but also to a clearer delineation of the meaning of the term "sovereign authority" and its application to particular cases as contemplated in the draft articles.

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II, pp. 18-20.

6. The United States is especially concerned with the test set forth in paragraph 2 of this article to determine whether a contract or transaction is "commercial". We support the standard that the character of a contract or transaction should be determined by reference to its nature and not its purpose. When a foreign State enters the market-place, there is no justification in modern international law for allowing the foreign State to avoid the economic costs resulting from the breach of its obligations.

7. Under the subsidiary test set forth in paragraph 2, the purpose of a contract or transaction is to be taken into account if, "in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction". Such a test is wholly at odds with the primary test that looks to the nature of the contract or transaction, and could be expected to have the effect in many cases of depriving private parties of the ability to obtain legal redress against States that breach their obligations. Moreover, the test would create great uncertainty at several levels. The paragraph leaves unclear what would constitute "State practice", how it could be established, and in what manner "purpose" could be "relevant" to determining the character of a contract or transaction. Parties engaged in transactions with States would hardly be in a position to ascertain how such a test might be applied in particular cases. In these circumstances, private parties could well be discouraged from dealing with many of Governments in greatest need of foreign investment and technological assistance.

8. The United States remains fundamentally opposed to this provision as written. We suggest that the provision should be further reviewed by the working group to determine, inter alia, whether there is any support for it in State practice.

Article 6 - Modalities for giving effect to State immunity

9. The United States believes there should be a provision in this article that encourages States that are properly served to appear before the court to assert their immunity. As a practical matter, many cases involve complex and contested facts and issues of law which cannot be adequately addressed in a default proceeding. The statement in the commentary that "[a]ppearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined" (A/46/10, p. 41) may have the unfortunate effect of encouraging States not to appear. While we are sympathetic to the problem of high litigation costs, we note that the imposition of appropriate sanctions (e.g., financial penalties) for initiating frivolous suits will help deter litigation in cases in which a foreign State is clearly immune.

10. With respect to paragraph 2 (b) of article 6, we are concerned about the potential breadth of a provision that considers that a proceeding has been instituted against a State in any case in which "the proceeding in effect seeks to affect the property, rights, interests or activities of that other State". The commentary notes (A/46/10, p. 43) that actions involving seizure

or attachment of State property have been considered in the practice of States to be proceedings that in effect implicate the foreign sovereign (even though it may not be named as a party to the proceeding). However, paragraph 2 (b) is not limited to such actions; it also includes proceedings that affect the "interests" or "activities" of a foreign State - terms that are sufficiently expansive to reach many other kinds of cases. For example, litigation involving banking, financial or other regulations that may have an impact upon foreign State activities would arguably also be encompassed within this provision. Moreover, it is unclear what obligations the parties to any such proceeding, or the court itself, may have towards the affected foreign State: for example, must notice be provided to the foreign State, by whom, and within what time period? We believe that further consideration should be given to these issues.

Article 8 - Effect of participation in a proceeding before a court

11. It should be made clear whether and to what extent a State that asserts immunity is precluded from also raising defences on the merits.

Article 9 - Counter-claims

12. The commentary appears to confuse the United States rule on counter-claims by citing section 1607 (c) of the Foreign Sovereign Immunities Act in support of the statement that in some jurisdictions "the effect of a counter-claim against a plaintiff State is also limited in amount ...; [if it exceeds] the principal claim, the counter-claim against the State can only operate as a set-off" (A/46/10, p. 64). In fact, section 1607 (c) does not express an additional condition, but rather provides for set-off as a distinct alternative applicable even as to counter-claims that do not arise out of the transaction or occurrence that is the subject of the principal claim. We suggest that the commentary be clarified and consideration given to allowing set-offs as described in section 1607 (c).

Article 10 - Commercial transactions

13. The reference in paragraph 1 to "applicable rules of private international law" appears to have been intended to provide for an adequate nexus between a foreign State's commercial activity and the forum State. Since there could be considerable debate over what those rules are, it would be helpful if this paragraph set forth a clearer statement of the nexus required.

14. The United States is concerned that paragraph 3 of article 10 risks establishing a significant and unwarranted limitation on the ability of private parties to obtain jurisdiction over a State that creates a separate State-controlled commercial entity. While we recognize that the separate status of a State entity of the kind described in paragraph 3 is normally to be respected, we nevertheless believe that a private party should not be precluded from "piercing the corporate veil" and suing the parent State in exceptional circumstances where a miscarriage of justice would otherwise result.

Article 11 - Contracts of employment

15. The commentary states that the employees covered by article 11 include "both regular employees and short-term independent contractors" (A/46/10, p. 95). It would be helpful to explore further the distinction intended between short- and long-term contractors, and the rationale for their separate treatment in this article.

16. The United States questions the breadth of paragraph 2 (a), particularly as construed by the commentary. The commentary states that the class of employees performing "functions closely related to the exercise of governmental authority" includes private secretaries, interpreters and translators (A/46/10, p. 96). In the experience of the United States, most suits brought by personnel in these three categories actually involve aspects that are commercial in nature (e.g., suits seeking damages for wrongful discharge based on work performance). We question the desirability of providing for immunity in such cases.

17. The United States also questions the continued immunity, as set forth in paragraph 2 (c), for contracts of employment between a State and an employee who was neither a national nor a habitual resident of the forum State when the contract of employment was concluded. Although the commentary states that in these cases the forum State "lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State" (A/46/10, p. 100), we believe that Governments have a strong interest in regulating the conduct of all employers and employees in its territory, subject to the narrow exceptions otherwise provided in this article. In this connection, we also note the observation referred to in the commentary that "the provision of paragraph 2 (c) might deprive of every legal protection persons who were neither nationals nor habitual residents of the State of the forum at the relevant time" (A/46/10, p. 101).

18. We note that paragraph 2 addresses, inter alia, situations in which the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual. However, it would be helpful to explore more broadly the issue of immunity for employer States in proceedings where the subject-matter involved reaches beyond individual employment contracts and potentially implicates sovereign functions of the employer State, for example, proceedings involving the right to engage in collective bargaining and the right to strike.

Article 12 - Personal injuries and damage to property

19. The United States favours the retention of immunity for claims based upon the exercise or performance or the failure to exercise or perform a discretionary function. Further, while the commentary notes that article 12 does not cover cases where there is no physical damage, such as cases involving damage to reputation or defamation, or interference with contract rights (A/46/10, p. 104), the text itself is silent on this question. We support the retention of immunity for these particular causes of action (as

well as others enumerated in section 1605 (a) (5) (B) of our Foreign Sovereign Immunities Act), but suggest that such limitations should be clearly reflected in the text of the article. At the same time, we question the apparent intent of the commentary to exclude any recovery for pain and suffering.

Article 13 - Ownership, possession and use of property

20. It would be helpful to clarify the extent to which this article would apply to proceedings to enforce compliance by foreign States with regulations of the forum State on the use of property (for example, zoning, environmental protection, historic preservation).

Article 14 - Intellectual and industrial property

21. The United States interprets article 14 as permitting States, through bilateral science and technology or other agreements, to establish non-judicial dispute resolution mechanisms for disputes concerning the allocation of intellectual property rights.

Article 16 - Ships owned or operated by a State

22. The United States has serious reservations about this article as drafted. The article as drafted does not adequately protect the interests of States in significant areas of State maritime activity, which often involve complicated relationships between States and private parties. For example, immunity of ships and cargo pivot on the purposes for which the ship was used at the time the cause of action arose. This may strip immunity from ships and cargo which are used for protected purposes when the proceeding is initiated (as opposed to their past uses), will threaten to interfere with the performance of these protected functions, and holds State functions hostage to the commercial behaviour of previous owners of ship or cargo. Immunity also apparently is stripped from cargo rented or leased by a State, even if used exclusively for government non-commercial purposes, and from bailments to the State.

23. The operation of in rem proceedings, as contemplated by the article, raises difficult issues which require further attention. In rem proceedings, especially those involving arrest to obtain jurisdiction, have the potential to tie up State ships and cargo for extended periods of time. Article 16 is especially worrisome in this regard because immunity for ships and cargo pivots on the exclusive dedication of the ship or cargo to governmental, non-commercial purposes. Thus, ships and cargo with mixed functions may be exposed to in rem proceedings, no matter how small the non-protected component of their activities. If such proceedings are countenanced, protections for the State should be provided which will minimize the disruptive effect of these proceedings.

24. The United States also favours an explicit exclusion of punitive damages against States, both under article 16 and generally.

Article 17 - Effect of an arbitration agreement

25. The United States questions whether the expression "court ... which is otherwise competent" sets forth with sufficient clarity the nexus required between the arbitration and the forum State. Further, while the United States understands that the intention is to provide for jurisdiction to enforce arbitration agreements and confirm arbitration awards, we believe that this should be made express in article 17.

Article 18 - State immunity from measures of constraint

26. The United States notes that this article would appear to permit prejudgement attachment of State property in the absence of a waiver of immunity, in particular if the criteria of paragraph 1 (c) are satisfied. We believe further consideration should be given to the question whether prejudgement attachments in such circumstances would create a potential for undesirable harassment and disruption. Moreover, we note that the phrase "intended for use" in paragraph 1 (c) creates some uncertainty that could invite speculation or perhaps give rise to potentially intrusive inquiry concerning the intentions of Governments.

Article 20 - Service of process

27. The Foreign Sovereign Immunities Act, to which the commentary to this article refers (A/46/10, p. 146), provides in section 1608 for more flexible means for service of process on foreign States, and particularly their agencies and instrumentalities, than are set forth in this article. We believe that the treatment of service of process in article 20 is too constrained, and that the article should be expanded to include more liberal methods for service as reflected in section 1608.

28. Finally, the United States notes its disappointment that the draft articles do not contain a provision limiting immunity in cases involving rights in property taken in violation of international law.